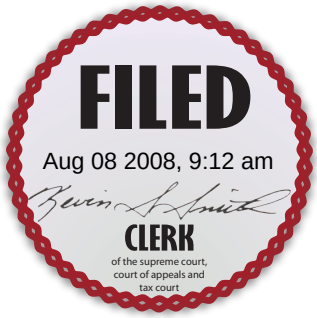

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IN THE
COURT OF APPEALS OF INDIANA

CHARLES S. TINK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 54A01-0712-CR-547
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0706-FA-79

August 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Charles S. Tink appeals his conviction for Class A felony burglary. Specifically, he contends that the trial court erred in admitting evidence from a show-up identification because it was unduly suggestive, the prosecutor engaged in misconduct by submitting photos of him in a misleading manner, the trial court erroneously instructed the jury on self-defense, the trial court abused its discretion in sentencing him, and his sentence is inappropriate. We conclude that the show-up identification was not conducted in such a manner that it would likely lead to a misidentification and that the prosecutor did not intentionally mislead defense counsel by submitting photos of Tink. In addition, we conclude that although the trial court did not give the pattern jury instruction on self-defense, the instruction it did give was a correct statement of the law and not an abuse of discretion. Finally, we conclude that the trial court did not abuse its discretion in failing to identify several mitigators and that Tink's forty-year sentence enhanced by thirty years for being a habitual offender for beating a man for no apparent reason—causing a broken nose, facial fractures, and loss of consciousness—is not inappropriate. We therefore affirm the trial court.

Facts and Procedural History

The facts most favorable to the verdict reveal that on the morning of June 5, 2007, Greg Myers, who owns a landscaping and equipment sales company, was in his home office doing some paperwork while he was waiting for a ride to his business. His front door was open, but his screen door was latched. At one point, he looked up from his computer screen to see a woman and a man inside his house uninvited. Myers knew the

woman, Jamie Ingram, from a previous business relationship, but he had never seen the man before. The man was later identified at Tink. Ingram, who was cursing, approached Myers and reached for his head. Tink then came out from behind Ingram and struck Myers in the head several times. Ingram and Tink, who both smelled of alcohol, were yelling at Myers about another person running Ingram off the road and other "gibberish." Tr. p. 163. Tink then put Myers in a chokehold and threatened to kill him and his family if he contacted the police. Myers, who was bleeding from his nose and mouth, briefly lost consciousness. After regaining consciousness, Ingram and Tink continued hitting Myers, mostly in the head. Tink then put Myers in a second chokehold, and Myers lost consciousness for a longer period of time. After regaining consciousness, Myers was hit again.

The attack lasted ten to fifteen minutes, and Myers suffered a broken nose with a deviated septum, facial fractures, dislocated jaw, bloody nose and mouth, bruised face, neck, and chest, and sore throat. Myers saw Ingram and Tink leave his house in a white compact car. Myers contacted the police, who arrived at his house a short time later. Myers gave the police a description of Ingram and Tink, and the police took pictures of Myers' injuries.

The police proceeded to Ingram's house, where they observed a white compact car in Ingram's driveway. Ingram and Tink were standing outside the house and appeared alarmed at the arrival of the police. Tink immediately headed in the direction of a tree line and ignored several of the officers' orders to "stop." Tink eventually stopped, and an officer was able to handcuff him. After being handcuffed, Tink was "belligerent,"

"uncooperative," and tried to "tug away" from the officer. *Id.* at 233. During the pat down, the officer found a "fairly large" pocketknife on Tink. *Id.* When asked his name, Tink responded, "Charlie Robinson." *Id.*

A police officer drove Myers to Ingram's house, and Myers, who was sitting inside the police car, identified both Ingram and Tink, who were standing outside police cars in handcuffs, as his attackers as well as the white car in Ingram's driveway as the car that had been at his house earlier that morning. While Tink was being transported to jail, he said "fu** you" to the officers and threatened to sue them for false arrest. *Id.* at 236. He also gave inconsistent statements of his whereabouts the night before. Upon arrival at the jail, Tink gave a false date of birth and claimed to have no social security number. However, officers later found on Tink a Social Security card and an Indiana identification card giving Tink's proper date of birth and name. Following their arrests, blood was found on the clothing of both Ingram and Tink. Subsequent DNA testing revealed that the blood belonged to Myers.

The State charged Tink with Class A felony burglary (bodily injury), Class B felony burglary, Class C felony battery (deadly weapon), Class D felony intimidation, and Class D felony strangulation. The State also alleged that Tink was a habitual offender. Following a jury trial, the jury found Tink guilty as charged and also found that he was a habitual offender. At the sentencing hearing, the trial court found no mitigators and the following aggravators: Tink's criminal history, he was on probation at the time of the offenses, and he has failed to address his problems with drugs and alcohol. The

court merged all of the counts into the Class A felony burglary[1] and sentenced Tink to forty years with a thirty-year enhancement for being a habitual offender. Tink now appeals.[2]

Discussion and Decision

Tink raises four issues on appeal. First, he contends that the trial court abused its discretion in admitting evidence from the show-up identification that occurred at Ingram's house a few hours after the attack because it was unduly suggestive. Second, he contends that the prosecutor engaged in misconduct by submitting photos of him in a misleading manner. Third, he contends that the trial court erroneously instructed the jury on self-defense. Finally, he contends that the trial court abused its discretion in sentencing him and that his sentence is inappropriate.

I. Show-Up Identification

Tink contends that the trial court abused its discretion in admitting evidence from the show-up identification that occurred at Ingram's house a few hours after the attack because it was unduly suggestive. Both the United States Supreme Court and the

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[1] Ind. Code § 35-43-2-1(2)(A).

[2] We notice that Tink's counsel has reproduced the entire transcript from this case in the Appellant's Appendix. We direct counsel to Indiana Appellate Rule 50(B), which states that the Appellant's Appendix shall contain, among other things: "(b) the *portion* of the Transcript that contains the rationale of decision and any colloquy related thereto, if and to the extent the brief challenges any oral ruling or statement of decision"; "(d) any other *short excerpts* from the Record on Appeal, in chronological order, such as pertinent pictures or *brief portions of the Transcript*, that are important to a consideration of the issues raised on appeal"; and "(e) any record material relied on in the brief *unless the material is already included in the transcript*." (Emphases added). As this rule recognizes, the inclusion of the entire transcript in the Appellant's Appendix will rarely be necessary. This is not one of those rare cases, and instead the inclusion only serves as a waste of paper.

In addition, Indiana Appellate Rule 50(B)(a) provides that the Appellant's Appendix shall contain the Clerk's Record, including the CCS. Although the CCS is included in Tink's Appendix, the Clerk's Record is not.

Indiana Supreme Court have criticized the practice of one-on-one show-ups because of their inherent suggestiveness. *Mitchell v. State*, 690 N.E.2d 1200, 1203 (Ind. Ct. App. 1998) (citing *Wethington v. State*, 560 N.E.2d 496, 501 (Ind. 1990)), *reh'g denied*, *trans. denied*. Such identifications, however, are not subject to a *per se* rule of exclusion. *Id.* Rather, the admissibility of the evidence turns on an evaluation of the totality of the circumstances. *Id.* Our Supreme Court has identified eight factors to be considered in determining whether a show-up identification was conducted in such a manner that it would likely lead to a misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the length of initial observation of the criminal, (3) lighting conditions, (4) distance between the witness and the criminal, (5) the witness's degree of attention, (6) the accuracy of the witness's prior description of the criminal, (7) the level of certainty demonstrated by the witness, and (8) any identifications of another person. *Id.* (citing *James v. State*, 613 N.E.2d 15, 27 (Ind. 1993); *Craig v. State*, 515 N.E.2d 862, 864 (Ind. 1987)). The length of time between the commission of the crime and the show-up procedure is also to be considered. *Id.* Show-up procedures are viewed more favorably when conducted close in time to the commission of the crime. *Id.*

Applying the *Mitchell* factors, we conclude that the trial court did not abuse its discretion in admitting evidence from the show-up identification at Ingram's house. Myers had a reasonable opportunity to view Tink during the commission of the crime based on their close proximity and the fact that the attack lasted ten to fifteen minutes. In addition, the attack occurred inside a house during daylight hours. Although Myers

inaccurately described to police the length of Tink's hair as medium when it was, in fact, short and bald on top and the color of Tink's beard as red/brown instead of gray, he accurately described Tink's build, clothing, glasses, beard, and companionship with Ingram. Additionally, only a few hours passed between the attack and the show-up identification at Ingram's house, and Myers did not have any difficulty identifying Tink. Finally, Myers was able to identify Ingram and the white vehicle. As such, the show-up identification was not conducted in such a manner that it would likely lead to a misidentification.

Nevertheless, any error in the admission of the identification evidence is harmless. *See Gall v. State*, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004) ("[E]rrors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. An error will be found harmless if its probable impact on the jury, in light of all the evidence, is sufficiently minor so as not to affect the substantial rights of a party."), *trans. denied*. Most importantly, Myers' blood was found on the shirt Tink was wearing at the time of his arrest. In addition, Tink was found with Ingram after the crime, he ran from the police and ignored repeated orders to stop, and at trial Tink admitted his involvement in the crime but claimed self-defense.

II. Prosecutorial Misconduct

Tink contends that the prosecutor engaged in misconduct by submitting photos of him in a misleading manner. Although Tink does not clearly explain this issue in his brief, we will attempt to do so here. Shortly before trial, Tink filed a motion to compel, which the trial court granted, seeking color photos of Myers that the State intended to

introduce at trial. The prosecutor then submitted a package of photos to defense counsel, which included both the requested photos *and* photos of Tink. The prosecutor included photos of Tink in this package because the officer who took these photos had been on vacation and the photos had just become available. When defense counsel received this package of photos, counsel mistakenly assumed that the photos were only the requested photos and forwarded the sealed package on to her expert without first reviewing them. When these photos of Tink then appeared at trial as State's Exhibits 15-20, defense counsel objected and claimed that the prosecutor had misled her. The prosecutor responded that he did not intentionally mislead or sandbag defense counsel and that he gave defense counsel the photos of Tink as soon as he received them from the vacationing officer. The trial court overruled defense counsel's objection and admitted the photos.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct and, if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he would not have been otherwise subjected. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.* We find no misconduct on the part of the prosecutor. Although the prosecutor included the photos of Tink in the same package as the photos requested in the motion to compel, the prosecutor had no reason to suspect that counsel would not look at the photos. In addition, even if the prosecutor engaged in misconduct, Tink was

not placed in a position of grave peril. The photos show Tink's swollen hands, him hiding from the camera, and items in his possession at the time of his arrest. It is unclear how he was prejudiced by these photos in light of Myers' testimony, Tink's behavior at the time of his arrest, and the presence of Myers' blood on Tink's clothing. Tink's claim of prosecutorial misconduct thus fails.

III. Self-Defense Instruction

Tink next contends that the trial court erroneously instructed the jury on self-defense. The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. *Boney v. State*, 880 N.E.2d 279, 293 (Ind. Ct. App. 2008), *trans. denied*. In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court. *Id.*

At trial, Tink tendered Indiana Pattern Jury Instruction (Criminal) No. 10.03 on self-defense, Appellant's App. p. 576, which the trial court rejected. Instead, the court gave the State's tendered jury instruction on self-defense, which provides:

> For the defendant's claim of self-defense to prevail he must show
> (1) He was in a place he had a right to be.
> <u>And</u>

(2) He did not provoke, instigate or participate willingly in the violence.

And

(3) He had a reasonable fear of bodily harm.

It is only necessary for the State to disprove one of these elements of self-defense beyond a reasonable doubt for the defendant's claim to fail.

The State may rebut a self-defense claim by affirmatively showing the defendant did not act to defend himself or by relying on evidence in its case in chief.

Id. at 577. The State's jury instruction cited *Jordan v. State*, 656 N.E.2d 816 (Ind. 1995), *reh'g denied*, and *Hollowell v. State*, 707 N.E.2d 1014 (Ind. Ct. App. 1999), as authority. Tink objected to the "in a place he had a right to be" language of the State's instruction. The trial court overruled the objection, finding that the *Jordan* and *Hollowell* courts used that language.

On appeal, Tink argues that the "in a place he had a right to be" language is not a correct statement of the law because it is not contained in Indiana's self-defense statute, Indiana Code 35-41-3-2, which provides:

(a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:

(1) is justified in using deadly force; and

(2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

Ind. Code 35-41-3-2(a). Subsection (e) provides that notwithstanding subsection (a), a person is not justified in using force if:

(1) *the person is committing or is escaping after the commission of a crime*;

(2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or

> (3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

Ind. Code § 35-41-3-2(e) (emphasis added).

We first note that the "in a place he had a right to be" language is a correct statement of the law. When a defendant raises a claim of self-defense, he is required to show three facts: (1) he was in a place where he had a right to be; (2) he acted without fault; and (3) he had a reasonable fear of death or serious bodily harm. *Hood v. State*, 877 N.E.2d 492, 497 (Ind. Ct. App. 2007) (citing *Wallace v. State*, 725 N.E.2d 837, 840 (Ind. 2000)), *trans. denied*. Although the "in a place he had a right to be" language is not contained in Indiana Code § 35-41-3-2, the concept is. That is, subsection (e) provides that a person is not justified in using force if the person is committing a crime. This clause is even contained in Tink's proffered pattern jury instruction. *See* Appellant's App. p. 576. This is essentially the same thing as Tink illegally entering Myers' house, meaning Tink was not in a place where he had the right to be. Although the preferred practice is to use pattern jury instructions, *see Boney*, 880 N.E.2d at 294, because the concept of being in a place he had a right to be is embodied in our self-defense statute, we conclude that the trial court did not abuse its discretion in instructing the jury on self-defense.

IV. Sentence

Tink challenges his sentence on several grounds. First, he argues that his Presentence Investigation Report and Addendum ("PSI")[3] contained inaccuracies regarding his criminal history and left out his mental health history, thus violating his due process rights pursuant to *Lang v. State*, 461 N.E.2d 1110 (Ind. 1984). We first note that this is not a case where Tink's PSI was not properly disclosed. Tink viewed his PSI and was given the opportunity to correct it at his sentencing hearing, where he advised the trial court of some minor mistakes in his criminal history. As for his mental health history, Tink claimed that he told his probation officer that he went to a psychiatrist in Georgia and was placed on medications but that this information was nevertheless left out of his PSI. Because Tink was given the opportunity to correct his PSI and, in fact, did, there is no due process violation.

Tink next argues that the trial court abused its discretion in failing to identify several mitigators. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind.

[3] We note that counsel for Tink included a copy of the PSI on white paper in the Appellant's Appendix. *See* Appellant's App. p. 566-73. We remind counsel that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the PSI printed on white paper in the Appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Id.* (quotation omitted).

Tink first asserts that the trial court failed to identify as mitigators his expression of remorse, mental illness, and substance abuse history. We first note that defense counsel did not argue that Tink was entitled to mitigation based on these things. Failure to proffer a mitigating circumstance at the sentencing hearing results in waiver of the issue for appellate review. *Bryant v. State*, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004), *trans. denied*. Waiver notwithstanding, Tink argues that the trial court should have considered his remorse as a mitigator. At the sentencing hearing, Tink testified to the following:

> I'm not that bad of a person, you know, if he wouldn't have put his hands on Jamie that day and pushed her and threatened her, you know, this situation would have never happened. I didn't go over there to his house to hurt him that day. I didn't go over there to break into his house that day. I didn't go there to harm him in any way.

Tr. p. 544. Tink then added, "I never thought I'd be going to prison for the rest of my life or facing going to prison for the rest of my life for simply going over" to Myers' house. *Id.* at 547.

The Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* We find

no impermissible considerations here and, therefore, no abuse of discretion in failing to identify Tink's remorse as a mitigator.

As for Tink's mental illness, which he claims he was treated for in Georgia, Tink has failed to establish any nexus between his mental illness and this crime. *See Barany v. State*, 658 N.E.2d 60, 67 (Ind. 1995). Therefore, the trial court did not abuse its discretion by failing to find Tink's mental illness as a mitigating factor.

Regarding Tink's substance abuse history, defense counsel conceded at the sentencing hearing that Tink "clearly" has a "problem" with alcohol and that he needs to address this problem during probation. Tr. p. 552. Counsel added that she did not believe that Tink had a problem with drugs anymore. In light of counsel's concession that Tink has a clear problem with alcohol, the trial court did not abuse its discretion in failing to identify Tink's substance abuse history as a mitigator and instead identifying his failure to address his problems with alcohol as an aggravator.

Tink next argues that the trial court failed to identify as a mitigator his good employment history, ability to work, attainment of a GED during his last incarceration with thirteen credit hours toward an Associate's Degree, and the fact that he had been helping Ingram support her child and that his son was about ready to attend college. The trial court acknowledged these things but found that they did not rise to the level of a significant mitigator. Given that Tink had a good job and was able to support other people because of his good job but nevertheless decided to commit this seemingly senseless crime, the trial court did not abuse its discretion in failing to consider these things as a significant mitigator.

Finally, Tink argues that the trial court erred in considering his criminal history as an aggravator instead of a mitigator. Though there is controversy over Tink's criminal record, it is undisputed that he has at least three prior convictions—receiving stolen property, armed violence (Illinois), and possession of methamphetamine—two of which are felonies. Tink received a sixteen-year sentence for his armed violence conviction. Given Tink's three convictions, two of which are felonies, and lengthy sentence for a violent crime, the trial court did not abuse its discretion in failing to identify Tink's criminal history as a mitigator and instead identifying it as an aggravator.

Finally, we address whether Tink's sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In his brief, Tink cites both Article VII, Sections 4 and 6 of the Indiana Constitution and Indiana Appellate Rule 7(B), but he does not analyze whether his sentence is inappropriate in light of the nature of his offense and his character. Typically this would result in waiver of the issue. *See* Ind. Appellate Rule 46(A)(8)(a). Nevertheless, we will give him the benefit of the doubt and address this issue on appeal.

As for the nature of the offense, the State, defense counsel, and trial court pointed out at the sentencing hearing that the motive for Tink's crime is not entirely clear. But what is clear is that Myers suffered a severe beating for no apparent reason, which is what the trial court found to be "so problematical." Tr. p. 554. Tink struck Myers in the head several times and put him in two chokeholds, causing him to lose consciousness each time. Myers suffered a broken nose with a deviated septum, facial fractures, dislocated jaw, bloody nose and mouth, bruised face, neck, and chest, and sore throat.

Moreover, Tink's character is not impressive. Tink has three convictions, two of which are for felonies. One of these felony convictions is for a violent crime for which Tink received a sixteen-year sentence. In addition, Tink was on probation at the time he committed this crime. He also has alcohol problems that have yet to be addressed. Tink has failed to persuade us that his forty-year sentence for Class A felony burglary enhanced by thirty years for being a habitual offender is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.